Office-Supreme Court, U.S.
FILED
MAY 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1790

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LAKE CHARLES AMERICAN PRESS, INC.
and WILLIAM HUGH SHEARMAN,
Petitioners,

vs.

ROBERT M. McHALE,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

MICHAEL K. DEES
1901 Oak Park Boulevard
Lake Charles, Louisiana 70601
Tel: 318-478-2727

Attorney for Respondent

TABLE OF CONTENTS

		Page
I.	Statement of the Case	1
	A. Course of Proceedings	1
	B. Present Posture of Case	2
	C. Facts	3
II.	Law and Argument	9
III.	Summary of Petitioners' Argument	11
	A. Opinion Versus Fact	12
	B. "Good Faith Belief" of Shearman	16
IV.	Conclusion	19

TABLE OF CITATIONS

	Page
Arceneaux v. Domingue, 365 So.2d 1330 (La. 1979)..	12
Curtis Publishing Company v. Butts, 388 U.S. 130, 87 Sup.Ct. 1975, 18 L.Ed.2d 1094 (1964)	2,10,11
Federal Rule Civil Procedure, Rule 52.....	12
Ford v. State Farm Mutual Automobile Insurance Company, 303 So.2d 787 (La.App.3d Cir. 1977).....	19
Gertz v. Robert Welch, Inc., 48 U.S. 323, 94 S.T. 297, 41 L.Ed.2d 789 (1974)	2,10,20
Grosjean v. American Press Co., 279 U.S. 233 (1936)	20
Hamilton v. Lake Charles American Press, Inc., 372 So.2d 239 (La.App. 3rd Cir. 1979)	20
Herbert v. Lando, 441 U.S. 153, 99 Sup.Ct. 1635, 60 L.Ed.2d 119 (1979)	2,10
Kidder v. Anderson, 354 So.2d 1306 (La. 1978).....	20
La. Civil Code Article 2315.1.....	3
Mashburn v. Collins, 355 So.2d 879 (Louisiana 1977)	12,13,20
National Association of Letter Carriers v. Austin, 418 U.S. 264, 284 (1974).....	12
New York Times Company v. Sullivan, 376 U.S. 254, 84 Sup.Ct.710 (1964).....	2,10,20
O'Donnel v. Philadelphia Record Company, 356 La. 307, 51 Atl.2 75.....	11
Robinson v. Liberty Mutual Company, 309 So.2d 791 (La.App.4th Cir. 1975).....	19
St. Amant v. Thompson, 390 U.S. 727, 88 Sup.Ct. 1323 (1968).....	2,3,10, 16,19,20
Time, Inc. v. Firestone, 424 U.S. 448, 96 Sup.Ct. 958 L.Ed. 2d 154 (1976)	10
Watts v. Indiana, 69 Sup.Ct. 1347, 338 U.S. 49.....	12

No. 80-1790

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LAKE CHARLES AMERICAN PRESS, INC.
and WILLIAM HUGH SHEARMAN,
Petitioners,

VS.

ROBERT M. MCHALE,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

I

STATEMENT OF THE CASE

A. Course of Proceedings

On February 3, 1981, the Honorable Lewis F. Powell refused the application of petitioners, LAKE CHARLES AMERICAN PRESS, INC. and HUGH SHEARMAN, to stay execution of this money judgment rendered in favor of ROBERT M. MCHALE, respondent, for damages resulting from a libelous article which attacked the professional reputation and competency of Mr. McHale. Prior to the article, Mr. McHale had practiced law for over twenty years and developed a recognized expertise in the field of public securities. Approximately twenty million dollars of public securities were issued and sold over his opinion.

This libel case was *judge tried* in the Fourteenth Judicial District Court, Parish of Calcasieu, State of Louisiana. After a

five day trial and after reviewing seventeen (17) volumes of evidence, the trial court issued a twenty-six (26) page opinion. The opinion details the trial court's factual conclusions and findings that the LAKE CHARLES AMERICAN PRESS, INC. and HUGH SHEARMAN published a false statement of fact with "actual malice" which greviously injured the reputation of Mr. McHale. A *compensatory* award of $150,000.00 was made. McHale's request for punitive damages and attorney fees was rejected.

Petitioners, thereafter, appealed the decision to the Third Circuit Court of Appeal, State of Louisiana, which *unanimously* upheld the verdict and adopted, verbetum, the trial court's opinion. The Court of Appeal, also, added an award of $25,000.00 for attorney fees.

The Louisiana Supreme Court, thereafter, denied defendants' request for a review of that decision.

Upon denial of the petitioner's request for a stay of the judgment by Mr. Justice Powell, the judgment was paid in full and a release executed. A copy of the Receipt and Satisfaction of Judgment is attached hereto as Appendix "A".

B. Present Posture of Case

The court should note carefully the opinion which petitioners seek to have reviewed by this court.

The law in libel and slander cases which, prior to this case, was well established by this court through its decisions in *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 286 (1964); *St. Amant v. Thomas,* 390 U.S. 727, 88 S.Ct. 1323 (1968); *Gertz v. Welch,* 418 U.S. 323, 94 S.Ct. 2997 (1974); *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975 (1967) and even this court's most recent interpretations in *Herbert v. Lando,* 441 U.S. 135, 99 S.Ct. 1635 (1979) was carefully and thoroughly analyzed by the trial court and court of appeal.

No dispute as to the "public official" status of the plaintiff was raised, and the stringent requirements of proof and standards for recovery were applied and met.

No new areas or frontiers of libel law were blazed by the trial court.

Punitive damages were rejected, although authorized by state law. (See La. Civil Code Article 2315.1—now repealed)

The compensatory damages are supported by volumes of medical testimony, other expert testimony and lay testimony.

No new issues in the context of libel law and the First Amendment are presented by this case. No legal principles were applied which are at conflict among the various lower courts.

The only real issue is one of fact—Do the facts of this case support a finding of fact by the lower court that the defendant published a libelous statement with "actual malice" as defined by the *New York Times* case, *supra.?* This question was resolved by the trial court unfavorably to the defendants and this has been defendants' only real complaint.

C. Facts

The petitioners have presented this court with only a few of the facts of this case. Because the Court has held in *St. Amant v. Thompson,* 390 U.S. 727, 88 S.Ct. 1323, 1325 (1968) that the meaning of "reckless disregard" is not encompassed in one "infallible definition", but rather, must be "marked out through case by case adjudication" a detailed review of the facts of this case is required.

[1] Bob McHale was appointed City Attorney for the City of Lake Charles on July 6, 1977. He had previously served in that position from 1965-1976. During this same period of time, he represented the Lake Charles Harbor and Terminal District. For both of these entities, he performed the usual legal work and, in addition, developed a specialized practice of bond work—issuing legal opinions for millions of dollars of public securities issued by these political bodies.

---

[1] Although respondent does not believe that transmission of the seventeen (17) volumes of evidence is essential to an understanding of the case, Rule 19.1, and accordingly has not requested transmission of the record, transcript and other record references are respectfully included.

The appointment in July, 1977, of Bob McHale as City Attorney triggered the publication of the following article:

"What's story behind
McHale reappointment?

"The reappointment of Robert M. McHale as Lake Charles city attorney smells to high heaven. Is it any wonder that the public has lost faith in persons who hold offices of public trust?

"We are appalled that Mayor William Boyer, who became the city's chief executive with a reputation for public spirit, could see fit to cram McHale's appointment down the throats of taxpayers.

"McHale has lived well at the public trough for over a decade, reaping thousands of dollars in personal wealth from fees he has been paid for bond issues, legal opinions and other assorted fees.

"Boyer has promised to make a full accounting of all fees, salaries and expenses paid to McHale by the city over the past 10 years. We expect him to hold to this promise.

"We will not be content to rest until we have determined to the penny how much McHale has been paid by the city. It is a matter of public record and the public deserves the full story. The bond fees are totally unnecessary and are a waste of taxpayers' money. No bond buyer would buy a nickel's worth of securities on McHale's opinion.

"Boyer's image has been badly tarnished by his cozy relationship with McHale and his stubborn refusal to name someone else city attorney. The city is loaded with legal talent and we will never understand why Boyer is so determined to give the post to a controversial attorney.

"McHale is the man, you may recall, who teamed with three other persons with political clout to wring over a million dollars in profits from the state when the group leased the former Sears building on the downtown mall.

"As if that wasn't political favoritism at its worst, we now have to listen to Woody Watson, president of the Lake Charles City Council, defend the 'sweet deal" lease. Watson, by the way, is a business associate of Boyer's.

"McHale was just a good businessman, Watson said, and if the state paid too much rent money, that was the state's problem. Just who does Watson think the state really is? The state is you and me and we don't like to be suckered by anybody.

American
Press
Editorial

"We wonder how much longer the taxpayers will stand for public funds being siphoned off for the benefit of politicians and their cohorts.

"McHale has also promised he will give the public the full story of how much he has earned as city attorney. We wonder if his report will include the names of other local citizens who have shared in the tax funds he has received from the city and a list of funds he may have received from others who have performed work for the city.

"Meanwhile, the people of Lake Charles are waiting for Boyer and Watson to explain the reasons for their unqualified support of McHale. The voters put both men in office and they have a right to demand what's behind the McHale reappointment. We are waiting impatiently for answers, fellows.

"What are you up to now?"

The editorial was published on July 21, 1977, two weeks after the re-appointment of Bob McHale.

Hugh Shearman, the publisher of the paper and acting as the editor at the time the article was written and published, directed that several members of his staff draft an editorial concerning the re-appointment. (Tr. 1585) Further, Bill Shearman, Jr., Hugh Shearman's son, was directed to go to Mr. McHale and interview him concerning the re-appointment. Young Shearman did this a few days prior to the publication of

the editorial. The interview with Mr. McHale lasted approximately one hour. Both Mr. McHale and his secretary explained in detail the nature of Mr. McHale's bonding work, several "bond issues" issued over McHale's opinion, and what, exactly, was involved in the issuances of these various public securities. The nature of the other legal work for the City was discussed. Fees for this work were discussed. The method of calculating the amount of the fee for each of the securities issued was told to young Shearman. During this hour-long interview, young Shearman made notes and the notes were turned over to the staff which Hugh Shearman had directed to draft the editorial. Strangely enough, these notes were destroyed a few weeks after this lawsuit was filed, despite the fact that young Shearman testified that his notes were *usually* kept. Further, these notes were not produced in response to a subpoena issued upon the filing of the suit to the Lake Charles American Press for all the information the Lake Charles American Press had pertaining to the subject of the lawsuit. (Tr. 528)

A news article resulting from the interview between young Shearman and Mr. McHale appeared in the Lake Charles American Press on the same date as the editorial. (McHale 1, Tr. 798) The article by young Shearman referred to McHale's bond work and to the amount of fees that he received on the bond work.

The draft editorial, prepared at Hugh Shearman's instruction, also referred to McHale's "bond work" and contemplated his doing the "bond work" on future contemplated bond issues. (McHale 5, Tr. 870-880)

Hugh Shearman and his staff of writers were very familiar with McHale's "bond work". Not only do the articles and rough drafts referred to above demonstrate their actual knowledge, but the Lake Charles American Press, being the official journal for both the City of Lake Charles and the Lake Charles Harbor and Terminal District, published hundreds of legal advertisements referring to the various public securities and, specifically, publicizing the fact that these securities were being sold on McHale's opinion. As the trial judge pointed out, there were at least 575 of these advertisements with 69 of the

advertisements stating that the securities were being sold on McHale's opinion. For purposes of verifying the publication of these legal ads, Hugh Shearman, himself, swore under oath on August 2, 1976, approximately one year prior to the article at issue here, that such a legal notice was published in the Lake Charles American Press. The language used in these advertisements should be carefully noted. (See page 847 of the transcript and the page following.) In this particular advertisement, approximately $100,000.00 worth of paving certificates were being sold and the advertisement stated that the purchaser would:

> "... accept delivery of said certificates at Lake Charles, Louisiana, it being understood that the City of Lake Charles, Louisiana, will furnish us free of charge at the time of delivery of said certificates, the unqualified approving legal opinion of Robert M. McHale, of counsel, McHale & Bufkin, Attorneys at Law, 1901 Oak Park Boulevard, Lake Charles, Louisiana."

Shearman testified, two weeks after this lawsuit was filed, that he was familiar with the contents of these legal ads and that he reads the ads when required to sign affidavits of publication. (Tr. 572)

Besides the legal advertisements, Hugh Shearman was made directly aware of Mr. McHale's work as a bonding attorney. Hugh Shearman served on the Board of Commerce and Industry for the State of Louisiana from 1966-1976. Part of the duties of this board was to review bond issues that were being issued in connection with industrial projects sponsored or connected with political subdivisions of the State. Two bond issues, on which Mr. McHale rendered an opinion, came before this board. These issues involved millions of dollars and Mr. McHale went to Mr. Shearman in order to obtain his approval as one of the members of the Board of Commerce and Industry. Mr. McHale discussed in detail the nature of his involvement in the issues, the nature of the issues and the fees which Mr. McHale was receiving for his work on these issues and other issues. From these conversations, Hugh Shearman knew that

Mr. McHale was issuing and selling securities on his opinions. (See Tr. 2117-2121 and see McHale Exhibits 32 and 33.) Hugh Shearman never denied these conversations.

In addition, just one month prior to the publication of the article, Hugh Shearman, as a member of the Board of Directors and the Discount Committee for Gulf National Bank of Lake Charles, authorized the purchase of $350,000.00 of certificates of indebtedness issued by the City of Lake Charles over the legal opinion of Mr. McHale. Mr. Shearman, on deposition, denied that he participated in this purchase, however, the certified copy of the minutes of that meeting clearly reflects his attendance and vote to purchase. (See McHale Exhibit 21, Tr. 1215-1216.) Faced with the truth at trial, Shearman never denied that he was aware that these certificates of indebtedness were purchased by his bank on Mr. McHale's opinion.

Surrounded by all these facts and with the knowledge that Mr. McHale had long been working in the field of public finance and issuing opinions on various securities, Hugh Shearman, in his editing of the various drafts, which also referred to McHale's "bond work", of the editorial, penned the following language:

> "No bond buyer would buy a nickel's worth of securities on McHale's opinion."

Shearman's reason for the statement—*McHale was making too much money.* (Tr. 2566-2568) Shearman was dead set on stopping this and the easiest way was to ruin McHale's reputation so he could no longer do bond work.

Nothing was done by Hugh Shearman or any of his staff to ascertain whether this fact was true. (Tr. 2582) Not even the semblance of an investigation as to McHale's competency as a bonding attorney was made. Rather, the facts, which Hugh Shearman and the American Press had at their fingertips, were ignored and, with the knowledge in Hugh Shearman's head that McHale was in fact issuing opinions on hundreds of thousands of dollars of securities, Hugh Shearman penned the editorial and sent it out for publication and reading by over 35,000 subscribers in an eight parish area.

This was not the first time that Hugh Shearman had ignored the facts in regard to Bob McHale. In 1974, the Press ran a series of nineteen news articles pertaining to the lease of a building owned by Mr. McHale and three other business associates which was leased to the State of Louisiana for the purposes of locating and consolidating the Welfare Offices for the State of Louisiana. The crux of the articles was that the lease arrangement was a "rip-off" to the State and that the rental being charged to the State was excessive; it having been obtained, in Shearman's view, as a political favor for McHale and his associates. McHale, in these news articles, was charged with "skulduggery", "robbery" and "fraud". This was all done at a time when Hugh Shearman had in his possession three appraisals from different certified real estate appraisers, one of which was chosen by Shearman, certifying that the rent charged to the State by McHale and his associates was a fair market lease value for the property that was being leased.

Shearman let no one know about the appraisals; neither the public nor his staff. He withheld the truth because, as he testified under oath, he and only he determines what is published by the Lake Charles American Press. (Tr. 602) With the July 21, 1977, article, the article at issue here, Hugh Shearman went one step further. He penned the offensive statement with all this knowledge and with his mental state such that there is no doubt that Shearman's action constituted a subjective intention to inflict harm through falsehood.

II

LAW AND ARGUMENT

Petitioners have asked this court to grant a review of this decision based on the fact that several other recent lower court cases, totally unrelated to this case, have been won by plaintiffs who have been slandered. Counsel for petitioners fails to give the court the facts of each of these cases and the law applied in them. Further, these cases involve large punitive awards, unlike the present case. Simply because a plaintiff has won, petitioners contend these other cases and this case must be overturned.

The issue of this case involves only one thing—the loss of a reputation. This Court has recently confirmed its concern for the loss of reputation when it stated in *Herbert v. Lando,* 441 U.S. 135, 99 S.Ct. 1635, at 1645, 60 L.Ed. 115 (1979):

> "(I)N the 15 years since *New York Times,* the doctrine announced by that case, which represented a major development and which was widely perceived as essentially protective of press freedoms, has been repeatedly affirmed as the appropriate First Amendment standard applicable in libel actions brought by public officials and public figures. *Curtis Publishing Co. v. Butts* (388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2nd 1094) supra; *St. Amant v. Thompson* (390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed. 2d 262) supra; *Gertz v. Robert Welch, Inc.,* supra; *Time, Inc. v. Firestone,* 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed. 2d 154 (1976). *At the same time, however, the Court has reiterated its conviction—reflected in the laws of defamation of all of the States—that the individual's interest in his reputation is also a basic concern. Time, Inc. v. Firestone,* supra, at 455-457, 96 S.Ct., at 966; *Gertz v. Robert Welch, Inc.,* 418 U.S., at 348-349, 94 S.Ct., at 3011". (emphasis added)

The principles of *New York Times, Curtis Publishing Co.* and *St. Amant* were strictly adhered to in this case.

This decision has no "chilling effect" or "killing effect" on the First Amendment. Rather, it is the petitioners who have, by deliberately and recklessly lying, not only "chilled" but "killed" a man's reputation. What does the loss of a reputation mean?

> "Good character, or reputation, consists of the general opinion of people respecting one. It is built up by a lifetime of conduct. It is probably the dearest possession that a man has, and once lost, it is almost impossible to regain. The possession of a good reputation is conducive to happiness in life and contentment. The loss of it, the absence of it, brings shame, misery and heartache. It is not like material

> things in life that one may have today, lose tomorrow, and repossess again the next day. Once lost, it is practically impossible of being regained, and it is to that injured reputation that a particular consideration in awarding damages in a libel case is directed. In that regard, you must level your level-headed common sense, and not be carried away by mere feelings and resentment. Injury to character and reputation is a grave and serious injury, and the law contemplates that for such an injury, the jury will bring to bear upon the problem their sense of justice and worldly wisdom insofar as money may recompense under such circumstances, fairly compensate for it." (See *O'Donnel v. Philadelphia Record Company,* 356 Pa. 307, 51 Atl. 2d 75)

As Chief Justice Warren said in *Curtis Publishing Co. v. Butts,* supra:

> "Freedom of the Press under the First Amendment does not include absolute license to destroy lives and careers."

III

SUMMARY OF PETITIONERS' ARGUMENT

Petitioners' arguments are two fold and are made alternatively.

First, petitioners contend that their statement is pure opinion, not fact. Alternatively, if it is fact, the proof of "actual malice" is not adequate because of Shearman's self serving declaration that he thought the statement was true.

Nowhere have petitioners alleged any "manifest error" as to the Court's finding of fact. Further, petitioners do not contend that the trial court's factual conclusion that the statement was not "opinion" and was made with "actual malice" is "clearly erroneous".

Petitioners simply contend that the trial judge and all the other nine judges involved on appeal, failed to agree with what petitioners consider a more reasonable view.

This Court has held that "all those matters which are usually termed issues of fact are for conclusive determination by the State Courts and are not opened for reconsideration by this Court. Observance of this restriction in our review of State Courts calls for the utmost scruple." *Watts v. Indiana,* 69 S.Ct. 1347, 1348, 338 U.S. 49. (Also see Federal Rule Civil Procedure, Rule 52; *Arceneaux v. Domingue,* 365 So.2d, 1330) (Louisiana, 1979).

No error of law is alleged to have been made but, on the contrary, the decision cited by petitioner in pointing out why the trial judge was wrong are the very same decisions which the trial court relied upon.

A.

Opinion Versus Fact

Petitioners contend that somehow the statement along with the rest of the article is only "loose language or undefined slogans". In support of their contention that such language and slogans should be completely protected, petitioners cite the cases of *National Association of Letter Carriers v. Austin,* 418 U.S. 264, 284 (1974) and *Mashburn v. Collins,* 355 So.2d 879 (Louisiana 1977).

The trial judge relied on these very same decisions in determining that the statement involved was not opinion, but rather fact assertions. The trial judge in the present case stated:

> "Defendants' final argument is that this was an expression of opinion and not a statement of fact." *Letter Carriers v. Austin,* 418 U.S. 264, 284, 94 S.Ct. 2770, 2781, 41 L.Ed. 2d 745, 761 (1974) says 'before the test of reckless or knowing falsity can be met, there must be a false statement of fact.'

> "The grammatical test of whether a statement is an opinion or a fact is not simply how declarant says he meant it. The better test is how readers understand it. The best test is a reflection of what is an opinion and what is a fact. A fact says Websters, is a thing that has actually happened, or is true. It can be checked and agreement on whether or not it is true can easily be reached. An opinion, says Websters, is what one thinks—a judgment—about some person or thing. No one can prove whether a statement of opinion is true or false. It remains an opinion. Comparatively, a statement of the author's taste of food was found in *Mashburn v. Collins,* 355 S.2d 879 (La. 1977), to be an opinion. The statement here involved was a statement of fact. Whether any bond buyer would buy securities on McHale's opinion is a statement which can be proved true or false."

The case of *Mashburn v. Collins, supra,* sets out in detail the distinctions between fact and opinion and what the court should look at in making that determination:

> "Although difficult to state in abstract terms, as a practical matter, the crucial difference between statement of fact and an opinion depends upon whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing facts.
>
> * * *
>
> In determining whether an expression is a statement of fact or opinion of under the common law, words must be read in their context. Words which, taken by themselves, would appear to be a positive allegation of fact, may be shown by the context to be a mere expression of opinion or argumentative influence. *On the other hand, if a statement, ostensibly in the form of an opinion, is apparently based on facts regarding the*

> *plaintiff or his conduct that have not been stated by defendant are assumed to exist by the parties to the communication, the expression gives rise to the inference there are undisclosed facts which justify the opinion. In such a case, the expression, although in a form of an opinion, in reality implies a statement of fact, which is not usually protected by common law privilege. In order for a statement to be defended as fair comment, it must be recognizable by the ordinary, reasonable person as opinion and not as a statement of fact."* (emphasis added.)

In contending that the statement is opinion, petitioners contend that Shearman did not mean it as fact and did not envision it would be taken as fact by his readers.

No matter what test is used—how the person making the statement meant it; how the ordinary and reasonable person perceived it; or if the statement is capable of being proved true or false—the evidence clearly points to a determination that the statement was a fact.

Hugh Shearman testified under oath that the statement was a fact and intended for it to be understood as a fact. Mr. Shearman stated at page 2582 of the transcript:

> "Question: Mr. Shearman, on August 8, 1977, in your deposition, when asked the question, page 9, 'No bond buyer would buy a nickel's worth of securities on McHale's opinion', do you think that's a fact?
>
> "Answer: Yes, sir.
>
> "Question: Your answer was, 'I think that is a fact.'
>
> "Question: You only thought it was a fact, did you not?
>
> "*Answer: I thought it was a fact. I still think it's a fact.*"

Nowhere did Shearman say that this statement was only his opinion or just an angrily issued epithet. He constantly contended it was a *true fact.*

Counsel for petitioners have simply either overlooked advising the court of this important statement or he simply has not read the record in this case. Counsel for petitioners now seek to change their own client's sworn testimony that the statement is a fact and to convince this court it was only his opinion.

Further, evidence of what the readers would understand the sentence to mean is the letter to the editor by a Mr. John R. Fielding (McHale Exhibit 42). The letter was published in the Lake Charles American Press a few days after the offending article. Mr. Fielding, in his letter to the editor of the Lake Charles American Press, stated:

> "Your editorial on the re-appointment of Robert M. McHale as City Attorney was an excellent piece of *fact* reporting of a very serious issue."

Mr. Shearman, on deposition, two weeks after the article was published, stated that the statement was a fact; at trial, Mr. Shearman stated that the statement was a fact; and the court concluded that the readers (Mr. Fielding and others) of the articles felt that it was a fact. Further, the trial judge concluded that the statement was capable of being proved true or false.

Every test or suggestion as to the determination of opinion versus fact set forth by petitioners can only be resolved against the statement being opinion.

The statement at issue is not just political jousting, excited utterances or exaggerated and heated statements made on the spur of the moment. Nor is the statement an epithet or fiery rhetoric such as "crook" or "blackmailer" or "scab".

The language of this article was coldly calculated for over two weeks. It was not "hot news".

The article, also, was not an attempt at persuasion to one's opinion. It asserted, as a fact, that the fees paid to McHale were a waste and totally unnecessary because McHale's legal ability is worthless. The trial judge's opinion is the only reasonable conclusion:

> "What would this sentence in context convey to the ordinary reader? It was inevitable, in my opinion,

> that the great majority of readers interpreted it exactly for what it said, that McHale's opinion on securities was worthless to any bond buyer. Since he had been indentified in the editorial earlier as an attorney who 'has lived well at the public trough . . . reaping thousands . . . in personal wealth from fees he has been paid for bond issues, legal opinions and other assorted fees', I believe the average reader got the impression that not only was he an incompetent attorney, whose opinions on securities were worthless, but that there was also some dishonesty connected with his acceptance of fees for bond issues and legal opinions without having rendered a legal service. The statement was defamatory."

B.

"Good Faith Belief" of Shearman

The next argument of the petitioners is that the lower courts have ignored the allegedly good faith and honest belief of Mr. Shearman that what he was saying was true or that it was just his opinion or that he did not mean to convey a false fact.

In this regard, the court in *St. Amant, supra,* pointed out that actual knowledge or recklessness cannot automatically be "sworn away" by the defendant. The court stated at page 1326:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith."

The petitioners' argument as to a good faith belief and expression of belief as to the truthfulness of the statement is simply not acceptable. It was not acceptable to the trial court because of the *numerous inconsistencies* in Mr. Shearman's

sworn testimony. These "inconsistencies" were not minor mistakes but complete reversals of important aspects of sworn testimony.

On deposition, Mr. Shearman testified as follows in regard to this knowledge of the contents of the numerous legal advertisements; some of which he had signed publication affidavits attesting that they had been published in the paper.

> "Question: Do you ever read the material that is given the newspaper to be printed in your newspaper by the City of Lake Charles?
>
> "Answer: Sometimes, yes, sir. Because I have to sign the legals when the manager is not in town.
>
> "Question: Do you know right off hand just about maybe how many times that it has appeared in your newspaper, the Lake Charles American Press, 'we will accept delivery of certificates at Lake Charles, Louisiana, it being understood that the City of Lake Charles, Louisiana, will furnish us free of charge at the time of delivery of said certificates are qualified approving legal opinion of Robert M. McHale'? Do you have any idea—do you know that appeared in your newspaper over and over and over?
>
> "Answer: I'm afraid I would have to answer yes."

At the trial, Mr. Shearman changed his testimony. (Transcript 1614-1616) He said at trial, contrary to his deposition, that he does not read these advertisements and was not aware of their publication.

Again, on deposition, Mr. Shearman testified that he was not a member of the Gulf National Bank Discount Committee which, approximately two months before this article was written, purchased $350,000.00 worth of securities of the City of Lake Charles which have been issued on the opinion of Mr. McHale. (Transcript 548, page 23 of the deposition). Yet the minutes of the meeting of the Discount Committee at which the securities of the City of Lake Charles were purchased clearly reflect that Mr. Shearman was a member of the Discount

Committee and was present at the discount meeting and approved the purchase of $350,000.00 worth of certificates of indebtedness that were issued by the City of Lake Charles under McHale's opinion. (See McHale 21, Transcript 1215.)

Another instance of a change in Shearman's testimony occurred at trial while Mr. Shearman was under direct examination (Transcript 2518). At this point, Mr. Shearman acknowledges that he had read Mr. Holly Heard's appraisal of the Sears building lease and also was sent two other appraisals, one from an appraiser in Baton Rouge and another from Mr. Dick Pease, of Lake Charles. Mr. Shearman states that he felt that the appraisals really showed nothing that he did not already know and, therefore, he should not even print them or inform the public of their existence.

On deposition, however, he clearly denied even knowing about the other two appraisals. At page 601 of the transcript (pages 76 and 77 of Mr. Shearman's deposition), Mr. Shearman states:

> "Question: I have information which causes me to believe that, although you had—you either had them in your possession or access to three different appraisals relative to the feasibility on the part of the State for renting that building and did not make the information available to Mr. Kingery?
>
> "Answer: Is there something the matter with that question?
>
> "Question: Well, is it true?
>
> "Answer: No. I don't have three of them. And if I did—if I had 15 of them, and didn't want to give them to Mr. Kingery, that would be my business.
>
> "Question: Do you have two?
>
> "Answer: No sir.
>
> "Question: Just had one?
>
> "Answer: I don't even know where that is. The tail doesn't wag the dog. Reporters don't tell me what to

do or what to print or when to print it. And nobody else does."

The trial judge certainly was entitled, based on these flagrant discrepancies and out and out lies of Mr. Shearman, to discount in toto any good faith expression of honest belief that what he was saying was true or that he really didn't understand what he was saying. Certainly, in any other civil matter the testimony of a person which has been proven to be false in several respects can be totally discounted. See *Robinson* v. *Liberty Mutual Company,* 309, S.2d 791 (La. App. 4th Circuit 1975); *Ford* v. *State Farm Mutual Automobile Insurance Company,* 303 S.2d 787 (La. App. 3rd Circuit 1977).

Even more so in a libel case which involves the proving of "actual malice", a subjective standard, the finder of fact, the trial judge in this case, is directed by this court's decision in *St. Amant, supra,* to determine if the publication is indeed made in good faith.

In short, petitioners have attempted to convince this court that Mr. Hugh Shearman, the author of this statement, neither intended nor understood the statements he made were statements of fact which he knew or probably knew were false. However, Mr. Shearman's statements under oath approximately ten days after the article was published and his statements at the trial, two and one-half years after the article was published, prove otherwise.

IV

CONCLUSION

Petitioners conclude their request for a review of this case with a general attack on the Louisiana Judiciary.

Other references are made throughout petitioners' brief to the "political trial judge", "punitive applications of local prejudice" and "judgments intended to punish a particular viewpoint".

Fifty year old cases such as *Grosjean* v. *American Press Co.*, 279 U.S. 233 (1936) are cited as your reason to reverse this case.

It is not this writer's purpose to defend the Judiciary of Louisiana, past or present, but rather, to represent a client. However, these slurs of "local prejudice" can not go unanswered.

The court should note that petitioners, themselves, rely on a recent Louisiana decision, *Mashburn* v. *Collins, supra.*, which defeated a plaintiff's request for defamatory damages. Further, the Louisiana Supreme Court in *Kidder* v. *Anderson,* 354 So. 2d, 1306 (La. 1978) reversed outright a $400,000.00 jury verdict for a public official because, unlike the present case, the dictates of *New York Times, supra, St. Amant, supra,* and *Gertz, supra,* had not been followed by the trial court.

The so called "political trial judge" involved in this case, several months before the present decision, dismissed a libel action on Summary Judgment against the Lake Charles American Press, Inc. in a suit filed by a local attorney. (See *Hamilton* v. *Lake Charles American Press, Inc.*, 372 So.2d 239 (La. App. 3rd Cir. 1979).

The Louisiana Judiciary has no inbred prejudice against the exercise of First Amendment rights. First Amendment rights are forfeited by the publication of knowing and reckless falsehoods.

The freedom of the Lake Charles American Press is no greater than Robert McHale's freedom to enjoy the pursuit of happiness through good reputation untarnished by knowing and reckless lies. These rights and values must be weighed, but intentional lies have no constitutional value or weight.

This case should set the base standard whereby we know that anything as appalling as what occurred here or worse will not be countenanced; that those public servants who engage in the public domain do not do so at the risk and expense of their reputations being smeared by lies simply because they make legitimate fees through the open democratic processes we all cherish.

Respectfully submitted,

MICHAEL K. DEES

Michael K. Dees
Attorney for Respondent
1901 Oak Park Boulevard
Lake Charles, Louisiana 70601
318-478-2727

APPENDIX "A"

ROBERT M. MCHALE VS. No. 77-3089	14th Judicial District Court Parish of Calcasieu
LAKE CHARLES AMERICAN PRESS, INC., *et al.*	State of Louisiana
Filed: Feb. 4, 1981	s/BESS C. WALLACE Deputy Clerk

RECEIPT AND SATISFACTION OF JUDGMENT

Robert M. McHale, plaintiff in the above captioned case, does hereby acknowledge receipt of the sum of TWO HUNDRED TWENTY THOUSAND THREE HUNDRED TEN AND 26/100 ($220,310.26) DOLLARS, in the form of a bank money order, paid to him by Lake Charles American Press, Inc. and William Hugh Shearman, in full payment and satisfaction of that certain judgment rendered by the 14th Judicial District Court, State of Louisiana, in the above captioned matter in favor of Robert M. McHale and against Lake Charles American Press, Inc. and William Hugh Shearman on November 2, 1979, and in full payment and satisfaction of that certain judgment rendered in the above captioned matter by the Court of Appeal, Third Circuit, State of Louisiana, in proceedings bearing No. 7756 on the docket of that court in favor of Robert M. McHale, and against Lake Charles American Press, Inc. and William Hugh Shearman dated October 8, 1980, and Robert M. McHale does hereby authorize and direct the Clerk of Court of Calcasieu Parish, Louisiana, to cancel and erase said judgment from the mortgage records of said parish and should said judgment have been recorded in any other parish or county, Robert M. McHale authorizes the recorder of mortgages of such parish or county to cancel the same from the public record.

IN WITNESS WHEREOF, said Robert M. McHale has executed this act of receipt and satisfaction of judgment at Lake Charles, Louisiana, on this 4th day of February, 1981, before me, the undersigned Notary, and the undersigned competent witnesses.

WITNESSES:

s/LINDA A. BOATRIGHT

s/CLAUDETTE POTTS

s/ROBERT M. MCHALE
Lake Charles, Louisiana
Feb. 4, 1981

s/LOUIS D. BUFKIN
NOTARY PUBLIC

BESS C. WALLACE